

107TH CONGRESS  
2D SESSION

# S. 2245

To amend title 49, United States Code, to enhance competition between and among rail carriers, to provide for expedited alternative dispute resolution of disputes involving rail rates, rail service, or other matters of rail operations through arbitration, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 24, 2002

Mr. BURNS (for himself, Mr. CRAIG, and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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## A BILL

To amend title 49, United States Code, to enhance competition between and among rail carriers, to provide for expedited alternative dispute resolution of disputes involving rail rates, rail service, or other matters of rail operations through arbitration, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE; AMENDMENT OF TITLE 49,**  
4       **UNITED STATES CODE.**

5       (a) SHORT TITLE.—This Act may be cited as the  
6       “Railroad Competition, Arbitration, and Service Act of  
7       2002”.

1 (b) AMENDMENT OF TITLE 49, UNITED STATES  
 2 CODE.—Except as otherwise expressly provided, whenever  
 3 in this Act an amendment or repeal is expressed in terms  
 4 of an amendment to, or a repeal of, a section or other  
 5 provision, the reference shall be considered to be made to  
 6 a section or other provision of title 49, United States  
 7 Code.

8 **SEC. 2. PURPOSES.**

9 The purposes of this Act are as follows:

10 (1) To eliminate unreasonable barriers to com-  
 11 petition among rail carriers.

12 (2) To provide for use of expedited, private  
 13 means for the resolution of disputes between ship-  
 14 pers and carriers.

15 **SEC. 3. CLARIFICATION OF RAIL TRANSPORTATION POL-  
 16 ICY.**

17 Section 10101 is amended—

18 (1) by inserting “(a) IN GENERAL.—” before  
 19 “In regulating”; and

20 (2) by adding at the end the following:

21 “(b) PRIMARY OBJECTIVES.—The primary objectives  
 22 of the rail transportation policy of the United States are  
 23 as follows:

24 “(1) To ensure effective competition among rail  
 25 carriers at origins and destinations.

1           “(2) To maintain reasonable rates for rail  
2           transportation where effective competition among  
3           rail carriers has not been achieved.

4           “(3) To maintain consistent and efficient rail  
5           transportation service for shippers.”.

6   **SEC. 4. ARBITRATION OF CERTAIN RAIL RATE, SERVICE,**  
7                           **AND OTHER DISPUTES.**

8           (a) IN GENERAL.—

9                   (1) AUTHORITY.—Chapter 117 of title 49 is  
10           amended by adding the following section after sec-  
11           tion 11707:

12   **“§ 11708. Arbitration of certain rail rate, service, and**  
13                           **other disputes**

14           “(a) ELECTION OF ARBITRATION.—A dispute de-  
15           scribed in subsection (b) shall be submitted for resolution  
16           by arbitration upon the election of any party to the dispute  
17           that is not a rail carrier.

18           “(b) COVERED DISPUTES.—(1) Except as provided  
19           in paragraph (2), subsection (a) applies to any dispute be-  
20           tween a party described in subsection (a) and a rail carrier  
21           that—

22                   “(A) arises under section 10701(c), 10701(d),  
23                   10702, 10704(a)(1), 10707, 10741, 10745, 10746,  
24                   11101(a), 11102, 11121, 11122, or 11706 of this  
25                   title; and

1 “(B) involves—

2 “(i) the payment of money;

3 “(ii) a rate charged by the rail carrier; or

4 “(iii) transportation by the rail carrier.

5 “(2) Subsection (a) does not apply to a dispute if the  
6 resolution of the dispute would necessarily involve the pro-  
7 mulgation of regulations generally applicable to all rail  
8 carriers.

9 “(c) ARBITRATION PROCEDURES.—The Secretary of  
10 Transportation shall prescribe in regulations the proce-  
11 dures for the resolution of disputes submitted for arbitra-  
12 tion under subsection (a). The regulations shall include  
13 the following:

14 “(1) Procedures, including time limits, for the  
15 selection of an arbitrator or panel of arbitrators for  
16 a dispute from among arbitrators listed on the ros-  
17 ter of arbitrators established and maintained by the  
18 Secretary under subsection (d)(1).

19 “(2) Policies, requirements, and procedures for  
20 the compensation of each arbitrator for a dispute to  
21 be paid by the parties to the dispute.

22 “(3) Procedures for expedited arbitration of a  
23 dispute, including procedures for discovery author-  
24 ized in the exercise of discretion by the arbitrator or  
25 panel of arbitrators.

1       “(d) SELECTION OF ARBITRATORS.—(1) The Sec-  
2       retary of Transportation shall establish, maintain, and re-  
3       vise as necessary a roster of arbitrators who—

4               “(A) are experienced in transportation or eco-  
5       nomic issues within the jurisdiction of the Board or  
6       issues similar to those issues;

7               “(B) satisfy requirements for neutrality and  
8       other qualification requirements prescribed by the  
9       Secretary;

10              “(C) consent to serve as arbitrators under this  
11       section; and

12              “(D) are not officers or employees of the  
13       United States.

14       (2) For a dispute involving an amount not in excess  
15       of \$1,000,000, the regulations under subsection (c) shall  
16       provide for arbitration by a single arbitrator selected by—

17              “(A) the parties to the dispute; or

18              “(B) if the parties cannot agree, the Secretary  
19       of Transportation, from the roster of arbitrators  
20       prescribed under paragraph (1).

21       “(3)(A) For a dispute involving an amount in excess  
22       of \$1,000,000, the regulations under subsection (c) shall  
23       provide for arbitration by a panel of three arbitrators se-  
24       lected as follows:

1           “(i) One arbitrator selected by the party elect-  
2           ing the arbitration.

3           “(ii) One arbitrator selected by the rail carrier  
4           or all of the rail carriers who are parties to the dis-  
5           pute, as the case may be.

6           “(iii) One arbitrator selected by the two arbitra-  
7           tors selected under clauses (i) and (ii).

8           “(B) If a selection of an arbitrator is not made under  
9           clause (ii) or (iii) of subparagraph (A) within the time lim-  
10          its prescribed in the regulations, then the Secretary shall  
11          select the arbitrator from the roster of arbitrators pre-  
12          scribed under paragraph (1).

13          “(e) DISPUTES ON RATES OR CHARGES.—(1) The re-  
14          quirements of this subsection apply to a dispute submitted  
15          under this section for resolution of an issue of the reason-  
16          ableness of a rate or charge imposed by a rail carrier.

17          “(2)(A) Subject to subparagraph (B), the decision of  
18          an arbitrator or panel of arbitrators in a dispute on an  
19          issue described in paragraph (1) shall be one of the final  
20          offers of the parties to the dispute.

21          “(B) A decision under subparagraph (A) may not  
22          provide for a rate for transportation by a rail carrier that  
23          would result in a revenue-variable cost percentage for such  
24          transportation that is less than 180 percent, as deter-

1 mined under standards applied in the administration of  
2 section 10707(d) of this title.

3       “(3) If the party electing arbitration of a dispute de-  
4 scribed in paragraph (1) seeks compensation for damages  
5 incurred by the party as a result of a specific rate or  
6 charge imposed by a rail carrier for the transportation of  
7 items for the party and the party alleges an amount of  
8 damages that does not exceed \$500,000 for any year as  
9 a result of the imposition of the specific rate or charge,  
10 the arbitrator, in making a decision on the dispute, shall  
11 consider the rates or charges, respectively, that are im-  
12 posed by rail carriers for the transportation of similar  
13 items under similar circumstances in rail transportation  
14 markets where there is effective competition, as deter-  
15 mined under standards applied by the Board in the admin-  
16 istration of section 10707(a) of this title.

17       “(f) TIME FOR ISSUANCE OF ARBITRATION DECI-  
18 SION.—Notwithstanding any other provision of this sub-  
19 title limiting the time for the taking of an action under  
20 this subtitle, the arbitrator or panel of arbitrators for a  
21 dispute submitted for resolution under this section shall  
22 issue a final decision on the dispute within the maximum  
23 period after the date on which the arbitrator or panel is  
24 selected to resolve the dispute under this section, as fol-  
25 lows:

1           “(1) In the case of a dispute involving  
2       \$1,000,000 or less, 120 days.

3           “(2) In the case of a dispute involving more  
4       than \$1,000,000, 180 days.

5       “(g) AUTHORIZED RELIEF.—A decision of an arbi-  
6       trator or panel of arbitrators under this section may grant  
7       relief in either or both of the following forms:

8           “(1) Monetary damages, to the extent author-  
9       ized to be provided by the Board in such a dispute  
10      under this subtitle.

11          “(2) An order that requires specific perform-  
12      ance of any obligation under a statute determined to  
13      be applicable, including any limitation of rates to  
14      reasonable rates, for any period not in excess of two  
15      years beginning on the date of the decision.

16      “(h) JUDICIAL CONFIRMATION AND REVIEW.—The  
17      following provisions of title 9 shall apply to an arbitration  
18      decision issued in a dispute under this section:

19          “(1) Section 9 (relating to confirmation of an  
20      award in an arbitration decision), which shall be ap-  
21      plied as if the parties had entered into an agreement  
22      under title 9 to submit the dispute to the arbitration  
23      and had provided in that agreement for a judgment  
24      of an unspecified court to be entered on the award  
25      made pursuant to the arbitration.



1           “(2) Section 10 (relating to judicial vacation of  
2           an award in an arbitration decision).”.

3           (2) CLERICAL AMENDMENT.—The table of sec-  
4           tions at the beginning of such chapter is amended  
5           by inserting after the item relating to section 11707  
6           the following:

“11708. Arbitration of certain rail rate, service, and other disputes.”.

7           (b) TIME FOR IMPLEMENTING CERTAIN REQUIRE-  
8           MENTS.—Not later than 180 days after the date of the  
9           enactment of this Act, the Secretary of Transportation  
10          shall promulgate regulations, prescribe a roster of arbitra-  
11          tors, and complete any other action that is necessary for  
12          the implementation of section 11708 of title 49, United  
13          States Code (as added by subsection (a)).

14   **SEC. 5. ELIMINATION OF BARRIERS TO COMPETITION BE-**  
15                           **TWEEN CLASS I CARRIERS AND CLASS II AND**  
16                           **CLASS III CARRIERS.**

17          (a) RESTRICTION ON APPROVAL OR EXEMPTION OF  
18          CARRIERS’ ACTIVITIES BY SURFACE TRANSPORTATION  
19          BOARD.—Section 10901 is amended by adding at the end  
20          the following new subsection:

21          “(e)(1) The Board may not issue under this section  
22          a certificate authorizing an activity described in subsection  
23          (a), or exempt from the applicability of this section under  
24          section 10502 of this title such an activity that involves  
25          a transfer of interest in a line of railroad, by a Class I

1 rail carrier to a Class II or III rail carrier if the activity  
2 directly or indirectly would result in—

3 “(A) a restriction of the ability of the Class II  
4 or Class III rail carrier to interchange traffic with  
5 other carriers; or

6 “(B) a restriction of competition between or  
7 among rail carriers in the region affected by the ac-  
8 tivity in a manner or to an extent that would violate  
9 antitrust laws of the United States (notwithstanding  
10 any exemption from the applicability of antitrust  
11 laws that is provided under section 10706 of this  
12 title or any other provision of law).

13 “(2) Any party to an activity referred to in paragraph  
14 (1) that has been carried out, or any rail shipper affected  
15 by such an activity, may request the Board to review the  
16 activity to determine whether the activity has resulted in  
17 a restriction described in that paragraph. If, upon review  
18 of the activity, the Board determines that the activity re-  
19 sulted in such a restriction and the restriction has been  
20 in effect for at least 10 years, the Board shall declare the  
21 restriction to be unlawful and terminate the restriction un-  
22 less the Board finds that the termination of the restriction  
23 would materially impair the ability of an affected rail car-  
24 rier to provide service to the public or would otherwise  
25 be inconsistent with the public interest.

1 “(3) In this subsection:

2 “(A) The term ‘antitrust laws’ has the meaning  
3 given that term in subsection (a) of the first section  
4 of the Clayton Act (15 U.S.C. 12(a)), except that  
5 such term also means section 5 of the Federal Trade  
6 Commission Act (15 U.S.C. 45) to the extent that  
7 such section 5 applies to unfair methods of competi-  
8 tion.

9 “(B) The terms ‘class I rail carrier’, ‘class II  
10 rail carrier’, and ‘class III rail carrier’ mean, respec-  
11 tively, a rail carrier classified under regulations of  
12 the Board as a Class I rail carrier, Class II rail car-  
13 rier, and Class III rail carrier.”.

14 (b) APPLICABILITY TO PREVIOUSLY APPROVED OR  
15 EXEMPTED ACTIVITIES.—Paragraph (2) of section  
16 10901(e) of title 49, United States Code (as added by sub-  
17 section (a)), shall apply with respect to any activity re-  
18 ferred to in that paragraph for which the Surface Trans-  
19 portation Board issued a certificate authorizing the activ-  
20 ity under section 10901 of such title, or exempted the ac-  
21 tivity from the necessity for such a certificate under sec-  
22 tion 10502 of such title, before, on, or after the date of  
23 the enactment of this Act.

1 **SEC. 6. SYSTEM WIDE COMPETITION.**

2 (a) TRACKAGE RIGHTS.—Chapter 111 is amended by  
3 inserting after section 11102 the following new section:

4 **“§ 11102a. Trackage rights**

5 “(a) ALTERNATIVE RAIL CARRIER SERVICE.—(1) A  
6 person who uses or seeks to use rail service for major train  
7 load shipments to or from a facility (whether located in  
8 a terminal area or served by terminal facilities) that has  
9 physical access solely to one rail carrier may request, as  
10 provided in this subsection, that rail service for such ship-  
11 ments be provided to or from that facility by—

12 “(A) an existing Class I rail carrier; or

13 “(B) an existing Class II rail carrier, existing  
14 Class III rail carrier, or new rail service provider  
15 that, as determined by the Federal Railroad Admin-  
16 istration before the person makes the request—

17 “(i) is or is likely to be capable of trans-  
18 porting the major train load shipments over the  
19 facilities of the one rail carrier to or from the  
20 facility with the physical access solely to that  
21 rail carrier;

22 “(ii) is or is likely to be capable of doing  
23 so in compliance with applicable Federal Rail-  
24 road Administration regulations and with the  
25 operating and safety rules of the rail carrier re-

1           sponsible for dispatching for the use of the fa-  
2           cilities; and

3           “(iii) has or is likely to have the financial  
4           ability (or insurance coverage with limits cus-  
5           tomary in the railroad industry) to satisfy li-  
6           ability claims arising from its operations.

7           “(2) For the purposes of this section a major train  
8           load shipment is any train load shipment that consists of  
9           50 or more rail cars and is tendered all at one time on  
10          a single bill of lading.

11          “(b) PROCEDURE FOR REQUESTING SERVICE.—(1)  
12          A person seeking under subsection (a) to obtain from an  
13          alternative rail service provider transportation for major  
14          train load shipments to or from a facility described in  
15          paragraph (1) of that subsection shall file with the Board  
16          a notice of intent to request that service. The notice shall  
17          include the following:

18                 “(A) A description of the facilities to be used  
19                 by the alternative service provider.

20                 “(B) A statement that the person has at-  
21                 tempted without success, through negotiations with  
22                 the rail carrier that has been providing the person  
23                 with rail service to or from the facility, to obtain the  
24                 proposed service from that rail carrier on terms

1 similar to those available from the alternative rail  
2 service provider.

3 “(C) Any other details of the proposed service.

4 “(D) If the alternative rail service provider is a  
5 provider described in subparagraph (B) of sub-  
6 section (a)(1), a certification by the Federal Rail-  
7 road Administration of the determinations required  
8 for eligibility under that subparagraph.

9 “(2)(A) Subject to subparagraph (D), rail service de-  
10 scribed in a notice filed with the Board under paragraph  
11 (1) may be provided by the alternative rail service provider  
12 referred to in the notice beginning 60 days after the notice  
13 is so filed unless, before the expiration of that 60-day pe-  
14 riod, the Board determines that the alternative rail service  
15 provider’s use of the facilities involved—

16 “(i) will be unsafe;

17 “(ii) is not operationally feasible; or

18 “(iii) will substantially impair the ability of the  
19 other rail carrier or rail carriers using the facilities  
20 to provide transportation over those facilities in ac-  
21 cordance with the reasonable requirements of the  
22 customers served by the other carrier or carriers as  
23 of the date of the Board’s determination.

24 “(B) The rail carrier or carriers that own or provide  
25 transportation over the facilities to be used by an alter-

1 native rail service provider in rail service covered by a no-  
2 tice filed with the Board under paragraph (1) shall have  
3 the burden of proving the matters described in clauses (i),  
4 (ii), and (iii) of subparagraph (A).

5 “(C) The Board shall consult with the Federal Rail-  
6 road Administration in determining the facts regarding  
7 any allegation by a rail carrier or rail carriers that an al-  
8 ternative rail service provider’s use of facilities would be  
9 unsafe.

10 “(D) An alternative rail service provider may not  
11 begin to provide any rail service under subparagraph (A)  
12 before the provider’s train crews are qualified to operate  
13 over the facilities to be used to provide the service, as de-  
14 termined under rules applicable to such operations.

15 “(e) DISPATCHING AND OTHER RESPONSIBIL-  
16 ITIES.—(1) The rail carrier responsible for controlling rail  
17 operations on, or for dispatching for the use of, facilities  
18 used by any alternative rail service provider pursuant to  
19 a notice filed with the Board under subsection (b) shall—

20 “(A) continue to perform those functions for all  
21 rail carriers using the facilities, including the alter-  
22 native rail service provider; and

23 “(B) dispatch trains for the alternative rail  
24 service provider, without discrimination, on the same  
25 basis that the rail carrier would apply if it were pro-

1       viding the transportation for the traffic transported  
 2       by the alternative rail service provider.

3       “(2) The Board shall have jurisdiction over, and shall  
 4 promptly resolve, any disputes arising under paragraph  
 5 (1)(B).

6       “(d) COMPENSATION FOR USE OF FACILITIES.—(1)  
 7 An alternative rail service provider that, pursuant to a no-  
 8 tice filed with the Board under subsection (b), is providing  
 9 transportation over facilities owned by another rail carrier  
 10 shall compensate the owner of the facilities on such terms  
 11 as the alternative rail service provider and the owner may  
 12 agree. The terms of compensation shall be adjusted annu-  
 13 ally, as the parties may agree, effective as of the anniver-  
 14 sary of the date on which the alternative rail service pro-  
 15 vider began to use the facilities.

16       “(2)(A) The terms of compensation for an owner of  
 17 facilities for the use of facilities by an alternative rail serv-  
 18 ice provider shall be established on a basis that provides  
 19 for the alternative rail service provider to compensate the  
 20 owner at a level that—

21               “(i) defrays the relevant costs incurred by the  
 22 owner for transportation over those facilities to the  
 23 extent of a share that is proportionate to the use of  
 24 those facilities by the alternative rail service provider



1 in relation to the use of those facilities by all users  
2 of the facilities; and

3 “(ii) provides the owner with a reasonable re-  
4 turn on and of the owner’s net book investment in  
5 road property for the facilities (exclusive of write-ups  
6 or write-downs resulting from mergers and consoli-  
7 dations of any of the facilities that were acquired  
8 from another rail carrier on or after July 1, 1995).

9 “(B) For the purposes of subparagraph (A), an alter-  
10 native rail service provider’s proportionate share of the  
11 total relevant costs incurred by the owner of facilities for  
12 the use of facilities during the first 12 months of the pro-  
13 vider’s use of the facilities pursuant to a notice filed with  
14 the Board under subsection (b) shall be the ratio of—

15 “(i) the extent to which the alternative rail  
16 service provider is reasonably expected to use the fa-  
17 cilities during that 12-month period, measured in  
18 gross ton-miles, to

19 “(ii) the total volume of the use of the facilities  
20 by all users of the facilities during the 12 calendar  
21 months preceding the month in which the notice was  
22 filed with the Board, measured in gross ton-miles.

23 “(C) For the purpose of calculating an annual adjust-  
24 ment of the terms of compensation for an owner of facili-  
25 ties for the use of those facilities for rail service by an

1 alternative rail service provider, the ratio applied under  
 2 subparagraph (A) for determining the alternative rail serv-  
 3 ice provider's proportionate share of the total relevant  
 4 costs incurred by the owner of facilities for the use of fa-  
 5 cilities shall be the ratio of—

6           “(i) the total volume of the use of the facilities  
 7       by the alternative rail service provider during the 12  
 8       calendar months preceding the month in which the  
 9       adjustment takes effect, measured in gross ton-  
 10      miles, to

11           “(ii) the total volume of the use of the facilities  
 12      by all users of the facilities during those 12 months,  
 13      measured in gross ton-miles.

14           “(D) For the purposes of subparagraph (A), the total  
 15 relevant costs for use of facilities shall include the fol-  
 16 lowing:

17           “(i) Roadway maintenance expenses.

18           “(ii) Costs reasonably related to the dispatching  
 19      or control of the operation of users' trains.

20           “(iii) Any ad valorem taxes.

21           “(3)(A) If the owner of facilities to be used by an  
 22 alternative rail service provider pursuant to a notice filed  
 23 with the Board under subsection (b) and the alternative  
 24 rail service provider do not agree on the terms of com-  
 25 pensation for the initial use of the facilities before the ex-

1 piration of the 60-day period applicable to the notice  
 2 under paragraph (2) of that subsection (b), either party  
 3 (or the person requesting the rail service from the alter-  
 4 native rail service provider) may request the Board to es-  
 5 tablish the terms of compensation. The Board shall estab-  
 6 lish those terms of compensation, in accordance with the  
 7 standards applicable under this subsection, within 60 days  
 8 after receiving such a request. The terms so established  
 9 shall be effective retroactively as of the date on which the  
 10 60-day period applicable under subsection (b)(2) expires.

11 “(B) If the owner of facilities and an alternative rail  
 12 service provider do not agree on an annual adjustment to  
 13 terms of compensation under paragraph (1) before the an-  
 14 niversary of the date on which the alternative rail service  
 15 provider began to use the facilities, either party may sub-  
 16 mit the dispute to the Board. The Board shall resolve the  
 17 dispute within 60 days after the dispute is submitted. Any  
 18 adjustment pursuant to a resolution of the dispute shall  
 19 take effect retroactively as of that anniversary date.

20 “(e) NEW AND ENHANCED FACILITIES.—(1) If it is  
 21 necessary for an owner of facilities to construct a new con-  
 22 necting track or interlocker or any other new facility or  
 23 to improve a connecting track, interlocker, or other facility  
 24 of that owner solely to accommodate the commencement  
 25 of rail service by an alternative rail service provider under

1 this section, the person requesting the rail service by the  
 2 alternative rail service provider over those facilities shall  
 3 pay the entire reasonable cost of the construction or im-  
 4 provement. The owner constructing the new facility or fa-  
 5 cilities shall own the newly constructed or improved facil-  
 6 ity or facilities, as the case may be.

7       “(2) If, at any time during the period of use of facili-  
 8 ties by one or more alternative rail service providers pur-  
 9 suant to this section, it is necessary to construct or im-  
 10 prove facilities to ensure the safe or efficient operation of  
 11 rail service by the alternative rail service providers and  
 12 all other rail carriers using the facilities to provide rail  
 13 service, the reasonable cost of the construction or improve-  
 14 ment shall be shared by the owner and each of the users  
 15 of the facilities on such terms as those parties may agree.  
 16 Any dispute concerning such terms shall be promptly re-  
 17 solved by the Board upon the request of any such user.

18       “(f) RELATIONSHIP TO OTHER AUTHORITIES.—This  
 19 section may not be construed to provide an exclusive rem-  
 20 edy, nor to limit the availability of any other remedy under  
 21 this part, to users of rail transportation for the enhance-  
 22 ment of intramodal rail competition.”.

23       (b) CLERICAL AMENDMENT.—The table of contents  
 24 at the beginning of such chapter is amended by inserting  
 25 after section 11102 the following new item:

“11102a. Trackage rights.”.

1 **SEC. 7. EFFECTIVE DATES.**

2 (a) IN GENERAL.—Except as provided in subsection  
3 (b), this Act and the amendments made by this Act shall  
4 take effect on October 1, 2002.

5 (b) EXCEPTIONS.—Section 6 and the amendment  
6 made by that section shall take effect on the date of enact-  
7 ment of this Act.

○